UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| NICHOLAS COOK, individually and on behalf of all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>ATOSSA GENETICS, INC., STEVEN C. QUAY, CHRISTOPHER BENJAMIN, KYLE GUSE, SHU-CHIH CHEN, JOHN BARNHART, STEPHEN J. GALLI, ALEXANDER CROSS, H. LAWRENCE REMMEL, DAWSON JAMES SECURITIES, INC., VIEWTRADE SECURITIES, INC., and PAULSON INVESTMENT COMPANY, INC.,<br><br>Defendants. | CASE NO. C13-1836-RSM<br><br>ORDER ON MOTIONS TO APPOINT LEAD PLAINTIFF |

## I. INTRODUCTION

This matter comes before the Court on Movants Miko Levi, Bandar Almosa, and Gregory Harrison's (collectively the "Levi Group") Motion for Appointment as Lead Plaintiff (Dkt. # 7), and Movant Hai Dam's Motion for Appointment as Lead Plaintiff (Dkt. # 9). Movant David

Chobanian seeks to withdraw his motion for appointment in support of the Levi Group's motion. *See* Dkt. ## 3, 20. For the reasons that follow, the Court appoints the Levi Group as lead plaintiff, and the law firms of Block & Leviton LLP ("Block & Leviton") and Pomerantz Grossman Hufford Dahlstrom & Gross LLP ("Pomerantz") as co-lead counsel and the law firm of Zwerling, Schachter & Zwerling, LLP ("Zwerling Schacter") as liaison counsel.

## II. BACKGROUND

This is a federal securities class action brought against Atossa Genetics, Inc. ("Atossa"), several of its officers and directors, and the underwriters for Atossa's November 8, 2012 initial public offering ("IPO"). The Class Action Complaint ("CAC") alleges that Defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("1934 Act") and Rule 10b-5 promulgated by the Securities and Exchange Commission, and Sections 11, 12(a)(2) and 15 of the Securities Exchange Act of 1933 ("1933 Act"). The 1933 Act claims allege that Defendants made materially untrue statements in the Registration Statement and Prospectus used in connection with the IPO and the 1934 Act claims are based on materially false and misleading statements made by Atossa and the named officers and directors between November 8, 2012 and October 4, 2013 (the "Class Period"). *See* Dkt. # 1, ¶ 1. Named Plaintiff Nicholas Cook published the initial notice of pendency of class action required by the Private Securities Litigation Reform Act of 1995 on October 10, 2013. *See* Dkt. # 6, Makris Decl., Ex. A.

Atossa is a development-stage healthcare company that commercializes diagnostic risk assessment products for detecting pre-cancerous conditions that may lead to breast cancer. Dkt. # 1, ¶ 2. Under certain circumstances, medical device manufacturers may bring products to market through compliance with the U.S. Food and Drug Administration's ("FDA") Section 510(k) submission process of the Federal Food, Drug, and Cosmetic Act. The 510(k) submission

process allows the FDA to determine whether a medical device is new or significantly altered such that the safety and effectiveness of the device may be affected. *Id.* at ¶ 3.

Atossa's flagship product came to market through this procedure. During the Class Period, Atossa stated in its company prospectus, which was included in its SEC Form S-1/A that "[t]he ForeCYTE Breast Health Test . . . involves collecting a specimen of nipple aspirate fluid, or NAF, using our patented, FDA-cleared Mammary Aspirate Specimen Cytology Test, or MASCT, System (***our MASCT System received 510(k) clearance from the FDA in 2003***)." *Id.* at ¶¶ 6, 34. According to the CAC, Atossa materially altered the MASCT system such that it was required to undergo additional FDA review and Section 510(k) qualification. When it failed to contact the FDA to obtain additional review, the CAC alleges that Atossa misled investors regarding FDA regulatory compliance. *Id.* at ¶ 7.

On February 25, 2013, Atossa disclosed that it had received a warning letter from the FDA regarding the 510(k) clearance of the MASCT System and MASCT System Collection Test. The letter also raised "certain issues with respect to the Company's marketing of the System and the Company's compliance with FDA Good Manufacturing Practices (cGMP) regulations among other matters." *Id.* at ¶ 8.

On release of this news, Atossa shares decreased $0.3869 per share to close at $6.54 per share on February 25, 2013. *Id.* at ¶ 9.

Roughly seven months later, on October 4, 2013, Atossa issued the following press release:

> On October 4, 2013 Atossa Genetics Inc. (NASDAQ: ATOS) initiated a voluntary recall to remove the ForeCYTE Breast Health Test and the Mammary Aspiration Specimen Cytology Test (MASCT) device from the market. This voluntary recall includes the MASCT System Kit and Patient Sample Kit. The vast majority of these products (approximately ninety percent) are in inventory with Atossa's distributors and the remaining

> quantities are at customer sites across the United States. Distributors and customers should stop using affected products and return them to Atossa immediately.
>
> Atossa is removing the ForeCYTE Breast Health Test and the MASCT device from the market to address concerns raised by the U.S. Food and Drug Administration (FDA) in a warning letter received by Atossa in February 2013. The FDA raised concerns about (1) the current instructions for use (IFU); (2) certain promotional claims used to market these devices; and (3) the need for FDA clearance for certain changes made to the Nipple Aspirate Fluid (NAF) specimen collection process identified in the current IFU. Atossa will remove existing product from the market until FDA's concerns are addressed.

Following the announcement, Atossa stock declined $2.47 per share, more than 46%, to close at $2.85 per share on October 7, 2013.

## III. DISCUSSION

### A. Governing Law

Under the Private Securities Litigation Reform Act ("PSLRA"), private plaintiffs have twenty days from the filing of a class action securities complaint to publish a notice advising putative class members of the pendency of the action, the claims asserted, the purported class period, and the right of any class member to move the court to serve as lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(A)(i). Class members have sixty days from the date of publication to move the court for appointment as lead plaintiff. *Id.* The court then considers any motion to serve as lead plaintiff made by a putative class member. 15 U.S.C. § 78u-4(a)(3)(B)(i). The court appoints a lead plaintiff that is "most capable of adequately representing the interests of class members." *Id.*

Under the PSLRA, a plaintiff is presumptively adequate to serve as lead plaintiff if she (1) either filed the complaint or moved to serve as lead plaintiff, (2) has the largest financial interest in the relief sought by the class, and (3) otherwise satisfies Fed. R. Civ. P. 23. 15 U.S.C. § 78u-4(a)(3)(B)(iii). The presumption may be rebutted if another member proves that the

presumptively adequate plaintiff will not fairly and adequately represent the class or is subject to unique defenses. *Id.*

District courts must first identify the financial interests of the movants seeking to serve as lead plaintiffs to determine which has the greatest financial stake in the controversy. *In re Cavanaugh*, 306 F.3d 726, 730 (9th Cir. 2002). After selecting the plaintiff with the greatest financial interest, the court looks to that plaintiff's declarations and pleadings to determine whether the movant satisfies Rule 23(a). *Id.* If the movant is both "adequate" and "typical" as contemplated by Rule 23(a), the movant becomes the presumptively adequate lead plaintiff. After the presumptive lead plaintiff is identified, the court reviews evidence presented by other plaintiffs to rebut the presumption of lead plaintiff status. *Id.* If the evidence presented casts sufficient doubt on the adequacy and typicality of the presumptive lead plaintiff, the court looks to the movant with the second greatest financial interest and repeats the process. *Id.* at 731.

**B. Analysis**

First, the Court finds that this class action was properly noticed and that each motion to appoint lead plaintiff was timely filed under the time restraints imposed by the PLSRA. Next, the Court turns to the merits of the Levi Group and Mr. Dam's competing motions. As Mr. Chobanian has moved to withdraw his pending motion for appointment as lead plaintiff, that motion will not be considered and shall be stricken as moot.

1. Movant with the Greatest Financial Interest

There is no prescribed method for calculating a party's financial stake in the case. *Id.* at 730 n.4. However, courts "must compare the financial stakes of the various plaintiffs and determine which has the most to gain from the lawsuit," through "accounting methods that are both rationally and consistently applied." *Id.* at 730. Courts often consider the following four factors to determine which plaintiff has the largest financial interest: (1) total shares purchased,

(2) net shares purchased, (3) net funds expended, and (4) approximate loss suffered. *Frias v. Dendreon Corp.*, 835 F. Supp. 2d 1067, 1075 (W.D. Wash. 2011); *see also In re Olsten Corp. Sec. Litig.*, 3 F. Supp. 2d 286, 295 (E.D.N.Y. 1998).

Here, the following chart identifies the financial interests of the individual members of the Levi Group, the total financial interest of the Levi Group, and the financial interests of Mr. Dam.

| **Movant** | **Shares Purchased** | **Amount Expended** | **Retained Shares** | **Estimated Loss** |
|---|---|---|---|---|
| Harrison | 30,000 | ($153,898) | 30,000 | ($89,512) |
| Almosa | 10,000 | ($73,000) | 10,000 | ($51,538) |
| Levi | 10,000 | ($60,018) | 10,000 | ($38,674) |
| **Levi Group** | **50,000** | **($286,916)** | **50,000** | **($179,724)** |
| **Dam** | **31,200** | **($219,202)** | **28,000** | **($107,240)** |

Dkt. # 18, p. 3 (modified). The chart demonstrates that the Levi Group purchased the highest number of total shares, retained the highest number of shares, expended the largest number of funds, and suffered the largest estimated loss during the class period. As the Levi Group best satisfies each factor, it has the largest financial interest in this action.

2. Rule 23 Adequacy and Typicality

Having found that the Levi Group has the greatest financial interest, the Court next considers whether it meets the requirements of Rule 23. On a motion to serve as lead plaintiff, the Rule 23 inquiry depends on satisfaction of the "typicality" and "adequacy" aspects of the rule. *Frias*, 835 F. Supp. 2d at 1075. "At the lead plaintiff stage of the litigation, in contrast to the class certification stage, a proposed lead plaintiff need only make a preliminary showing that it will satisfy the typicality and adequacy requirements of Rule 23." *Sgalambo v. McKenzie*, 268 F.R.D. 170, 173 (S.D.N.Y. 2010) (internal quotations and citation omitted). Typical claims are those that (1) arise from the same event or course of conduct giving rise to the claims of other

class members and (2) are brought under the same legal theory. *Frias*, 835 F. Supp. 2d at 1075. "Adequacy" requires (1) that the presumptive lead plaintiff's interests align with the class's interests, and (2) that the presumptive lead plaintiff's selected counsel are "qualified, experienced, and generally able to conduct the litigation." *Id.* at 1076 (quoting *Schonfield v. Dendreon Corp.*, Case No. C07-800-MJP, 2007 WL 2916533, at * 4 (W.D. Wash. Oct. 4, 2007)).

Upon review of the Levi Group's moving papers, the group makes a preliminary showing that it meets the typicality and adequacy requirements. The Levi Group, like other putative class members, purchased shares of Atossa stock during the class period at allegedly inflated prices, and it sustained losses when Defendants' alleged misrepresentations were exposed. Therefore, its claims are typical of the class because they arise from Atossa's conduct during the class period and are brought under the same legal theory.

The Levi Group also meets the adequacy requirement because (1) its interests presumably align with the class and (2) it has selected qualified and competent class counsel. First, the Levi Group seeks to hold Atossa liable for the damages sustained by class members. Each member of the Levi Group has certified his intent to serve as a willing class representative and submitted a schedule detailing his transactions during the class period. Dkt. # 8, Leviton Decl., Ex. B. Second, the PSLRA requires that the proposed lead plaintiff select and retain class counsel, subject to the court's approval. 15 U.S.C. § 78u-4(a)(3)(B)(v); 15 U.S.C. § 77z-4(a)(3)(B)(v). By statute, that approval should not be withheld unless necessary "to protect the interests of the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa). Here, the requested lead law firms of Block & Leviton, and Pomerantz, have significant experience in securities litigation. *See id.*, Leviton Decl., Ex. D-E. In addition, requested liaison counsel, Zwerling Schacter, has extensive

securities litigation experience in this District and around the country. *See id.*, Leviton Decl., Ex. F. Thus, the Levi Group has made a *prima facie* showing for the Rule 23 requirements.

3. Mr. Dam's Opposition to the Levi Group's Appointment

Mr. Dam contends (1) that the Levi Group lacks standing to bring the 1933 Act claims and is therefore subject to a unique defense (2) that the Levi Group is a lawyer-driven aggregation of unrelated individual investors, which violates the PLSRA; and (3) that appointing the Levi Group's choice of co-lead counsel would be improper. Taking the standing argument first, Rule 23(b)(3) requires in part that, to maintain a class action, the court must find "that the questions of law or fact common to class members predominate over any questions affecting only individual members[.]" Fed. R. Civ. P. 23(b). Although 1933 Act standing is usually considered on a predominance or Rule 23(b)(3) challenge, Dam contends that a lack of standing would subject the members of the Levi Group to a unique defense rendering it an atypical lead plaintiff.

Section 11 of the 1933 Act provides a cause of action to any person who buys a security issued under a materially false or misleading registration statement. 15 U.S.C. § 77k. Although plaintiffs are not required to have purchased their shares from the shares offered under the misleading registration statement, they must, to maintain standing, be able to trace the purchase of those shares back to the relevant offering. *See Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th Cir. 1999). Mr. Dam points out that besides the shares offered under Atossa's IPO and associated registration statement, there were approximately 10.6 million pre-IPO shares that became "unrestricted," or available for trading, on May 7, 2013. *See* Dkt. # 22, Cantor Supp. Decl., Ex. 2. Mr. Dam argues that because all members of the Levi Group purchased their shares after May 7, 2013, they may not be able to prove that their purchased shares can be traced back

to the allegedly misleading registration statement. Thus, Mr. Dam contends, the Levi Group may not have standing to pursue the 1933 Act claims on behalf of the class.

Importantly, Mr. Dam has provided no evidence that any of the pre-IPO shares that could have been traded after May 7, 2013 actually entered the market. He raises the specter of a post-lock up influx by referencing Atossa's daily trading information from May 1, 2013 through May 15, 2013, which he downloaded from the Yahoo!Finance website.[1] The information indeed shows an increase in trading activity after May 6, 2013. When the search is expanded to include dates prior to May 2013, however, there is also a significant trading increase in March 2013, well before Dam contends that any pre-IPO shares could have entered the market.[2] Thus, Dam's contention that "[a] significant portion of those 10.6 million pre-IPO shares were likely placed on the market . . . given the quite dramatic increase in trading volume" (Dkt. # 24, p. 5) is entirely speculative as Atossa share trading volume appears to have similarly fluctuated before the lock-up's expiration. Such speculation is insufficient to rebut the presumption that the Levi Group satisfies the adequacy and typicality requirements. *See Cavanaugh*, 306 F.3d at 729; *see also In re Molycorp., Inc. Sec. Litig.*, Case No. 12-cv-0292-WJM-KMT, 2012 U.S. Dist. LEXIS 89191, at *6 (D. Colo. May 29, 2012) ("speculation that a movant may be either atypical or inadequate will not defeat the PLSRA's most adequate plaintiff presumption").

With respect to Dam's second challenge—that the Levi Group improperly aggregated unrelated investors—the Court finds the argument unpersuasive. "[T]here is no question that a

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[1] *See* Yahoo!Finance, http://finance.yahoo.com/q/hp?s=ATOS&a=04&b=1&c=2013&d=04&e=15&f=2013&g=d (last visited Feb. 13, 2014).

[2] *See id.*, http://finance.yahoo.com/q/hp?s=ATOS&a=00&b=1&c=2013&d=07&e=15&f=2013&g=d&z=66&y=66 (last visited Feb. 13, 2014).

group of investors can serve as 'lead plaintiff' . . . ." *Frias*, 835 F. Supp. 2d at 1072. Further, many courts have found that plaintiffs need not have had a pre-existing relationship to properly aggregate loss to demonstrate the largest financial interest. *See e.g.*, *Sabbagh v. Cell Therapeutics, Inc.*, Case No. C10-559-MJP, 2010 WL 3064427, at *4 (W.D. Wash. Aug. 2, 2010) ("[t]he trend in recent years, however, seems to be away from a blanket prohibition against 'lead plaintiff groups' with no pre-existing relationship"). While the PLSRA aims to discourage lawyer-driven litigation, courts have recognized that "a pre-existing relationship between [investors] that comprise a group is not required if the resulting group is small and cohesive enough such that it can adequately control and oversee the litigation." *Eichenholz v. Veriphone Holdings, Inc.*, Case No. C07-06140 MHP, 2008 WL 3925289, at *8 (N.D. Cal. Aug. 22, 2008); *see also In re Molycorp*, 2012 U.S. Dist. LEXIS 89191 at *6 (collecting cases).

In *Shonfield*, this Court observed that plaintiff groups with no pre-litigation connection vying for lead plaintiff status should provide the court with declarations detailing the member's background, and the group's intended structure and mechanism for functioning. 2007 U.S. Dist. LEXIS 76816 at *6.

> Such information should include descriptions of its members, including any pre-existing relationships among them; an explanation of how it was formed and how its members would function collectively; and a description of the mechanism that its members and the proposed lead counsel have established to communicate with one another about the litigation. If the proposed group fails to explain and justify its composition and structure to the court's satisfaction, its motion should be denied or modified as the court sees fit.

*Id.* at *6-7 (quoting *In re Networks Assocs., Inc., Sec. Litig.*, 76 F. Supp. 2d 1017, 1026 (N.D. Cal. 1999)).

Here, although Levi Group includes three individual investors who lack a pre-existing relationship, it has filed declarations attesting to the following: (1) that each member is a

sophisticated investor who is knowledgeable about SEC disclosure rules and SOX disclosure requirements; (2) that they will jointly work as "a small, cohesive, manageable group"; (3) that each member will supervise counsel and make important litigation decisions; and (4) that each member has agreed upon how they will make decisions, and have selected Mr. Harrison to act as the group's spokesperson and as liaison with counsel and the Court. *See* Dkt. ## 19–19-3, Leviton Decl. Upon review of the declarations, the Court finds that the Levi Group is a small, cohesive group that will endeavor to act in the best interests of the putative class members and manage the course of future litigation.

Finally, as to whether the Levi Group's request to approve two law firms as co-lead counsel is improper, Dam has failed to submit evidence that would tend to show impropriety. Dam refers the Court to the two declarations filed by Mr. Almosa to suggest possible impropriety of the Group's selection of counsel. In Mr. Almosa's first certification, he stated that he had retained the Rosen Law Firm P.A. to represent him in this action. Dkt. # 8-2, p. 5. In the second declaration, Mr. Almosa supported the joint appointment of Block & Leviton and Pomerantz. Dkt. # 19-3, p. 2. Although clearly inconsistent, the certification and declaration alone do not raise an issue as to whether Block & Leviton and Pomerantz can work together in the best interest of the class. Nor does this inconsistency demonstrate impropriety in the Group's selection of counsel. Notably, Dam does not challenge the competence, experience, and resources of the selected law firms to litigate this action. Thus, the Court finds that Mr. Dam has failed to rebut the presumption of adequacy and typicality of the Levi Group. Accordingly, the Levi Group shall be appointed Lead Plaintiff and the law firms of Block & Leviton and Pomerantz shall be appointed co-Lead Counsel. The law firm of Zwerling Schacter shall be appointed Liaison Counsel.

## IV. CONCLUSION

Having reviewed the motions, the responses and replies thereto, the declarations and attached exhibits, and the remainder of the record, the Court hereby finds and ORDERS:

(1) The Levi Group's Motion to Appoint Lead Plaintiff and Approve Lead Counsel (Dkt. # 7) is GRANTED;

(2) Mr. Dam's Motion to Appoint Lead Plaintiff (Dkt. # 9) is DENIED;

(3) Mr. Chobanian's Motion to Withdraw (Dkt. # 20) is GRANTED and his Motion to Appoint Lead Plaintiff (Dkt. # 3) is STRICKEN AS MOOT.

The Court further ORDERS as follows:

1. The Court hereby appoints Movants as Lead Plaintiffs for the class (the "Class") of purchasers of Atossa Genetics, Inc. common stock during the period between November 8, 2012 and October 4, 2013, inclusive (the "Class Period"). Movants satisfy all of the requirements for lead plaintiffs pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA").

2. Pursuant to the PLSRA, Movants have selected and retained the law firms of Block & Leviton LLP ("Block & Leviton") and Pomerantz Grossman Hufford Dahlstrom & Gross LLP ("Pomerantz") as Co-Lead Counsel in this action. The Court approves the selection of Block & Leviton and Pomerantz as Co-Lead Counsel for the putative Class.

3. Co-Lead Counsel for the Class shall have the following responsibilities and duties, to be carried out either personally or through counsel whom Co-Lead Counsel shall designate:

(a) the briefing and argument of motions;

(b) the conduct of discovery proceedings;

(c) the examination of witnesses in depositions;

(d) the selection of counsel to act as spokesperson at pretrial conferences;

(e) to call meetings of the plaintiffs' counsel as they deem necessary and appropriate from time to time;

(f) to conduct all settlement negotiations with counsel for defendants;

(g) to conduct or direct the pretrial discovery proceedings and the preparation for trial of this matter and to delegate work responsibilities to selected counsel as may be required; and

(h) to supervise any other matters concerning the prosecution, resolution or settlement of this action.

4. No motion, request for discovery, or other pretrial proceedings shall be initiated or filed by any plaintiff in the Class without the approval of Co-Lead Counsel, so as to prevent duplicative pleadings or discovery by plaintiffs. No settlement negotiations shall be conducted without the approval of Co-Lead Counsel.

5. Co-Lead Counsel shall have the responsibility of receiving and disseminating Court orders and notices, other than as may be served through this Court's ECF System.

6. Co-Lead Counsel shall be the contact between plaintiffs' counsel and defendants' counsel, as well as the spokesperson for plaintiffs' counsel, and shall direct and coordinate the activities of plaintiffs' counsel.

7. Other than as served through the Court's ECF System, defendants shall effect service of papers on plaintiffs by serving a copy of same on lead counsel by overnight mail service, e-mail or hand delivery. Co-Lead Counsel shall serve copies of such papers on any

other plaintiffs' counsel by e-mail or first-class mail. Co-Lead Counsel shall effect service of papers on defendants by serving a copy on defendants' counsel by overnight mail service, e-mail, or hand delivery.

8. During the pendency of this litigation, or until further order of this Court, the parties shall take reasonable steps to preserve all documents within their possession, custody, or control, including computer-generated and stored information, and materials such as computerized data and electronic mail, containing information which is relevant to the subject matter of the pending litigation.

9. The caption of this case shall be amended to read: *In re Atossa Genetics, Inc. Securities Litigation* and each future pleading shall bear this caption.

10. The Court hereby orders that Lead Plaintiffs are permitted to file an amended class action complaint within 60 days from the date of this Order.

Dated this 14th day of February 2014.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE